IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA-09-0322

PLAINS GRAINS LIMITED PARTNERSHIP, a Montana limited partnership; PLAINS GRAINS, INC., a Montana corporation; ROBERT E. LASSILA and EARLYNE A. LASSILA; KEVIN D. LASSILA and STEFFANI J. LASSILA; KERRY ANN (LASSILA) FRASER; DARYL E. LASSILA and LINDA K. LASSILA; DOROTHY LASSILA; DAN LASSILA; NANCY LASSILA BIRTWISLE; CHRISTOPHER LASSILA; JOSEPH W. KANTOLA and MYRNA R. KANTOLA; KENT HOLTZ; HOLTZ FARMS, INC., a Montana corporation; MEADOWLARK FARMS, a Montana partnership; JON C. KANTOROWICZ and CHARLOTTE KANTOROWICZ; JAMES FELDMAN and COURTNEY FELDMAN; DAVID P. ROEHM and CLAIRE M. ROEHM; DENNIS N. WARD and LaLONNIE WARD; JANNY KINION-MAY; C LAZY J RANCH; CHARLES BUMGARNER and KARLA BUMGARNER; CARL W. MEHMKE and MARTHA MEHMKE; WALTER MEHMKE and ROBIN MEHMKE; LOUISANA LAND & LIVESTOCK, LLC, a limited liability corporation; GWIN FAMILY TRUST, U/A DATED SEPTEMBER 20, 1991; FORDER LAND & CATTLE CO.; WAYNE W. FORDER and DOROTHY FORDER; CONN FORDER and JEANINE FORDER; ROBERT E. VIHINEN and PENNIE VIHINEN; VIOLET VIHINEN; ROBERT E. VIHINEN, TRUSTEE OF ELMER VIHINEN TRUST; JAYBE D. FLOYD and MICHAEL E. LUCKETT, TRUSTEES OF THE JAYBE D. FLOYD LIVING TRUST; ROBERT M. COLEMAN and HELEN A. COLEMAN; GARY OWEN and KAY OWEN; RICHARD W. DOHRMAN and ADELE B. DOHRMAN; CHARLES CHRISTENSEN and YULIYA CHRISTENSEN; WALKER S. SMITH, JR. and TAMMIE LYNNE SMITH; JEROME R. THILL; AND MONTANA ENVIRONMENTAL INFORMATION CENTER, a Montana nonprofit public benefit corporation,

Plaintiffs and Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, the governing body of the County of Cascade, acting by and through Peggy S. Beltrone, Lance Olson and Joe Briggs,

Defendants and Appellees,

and

SOUTHERN MONTANA ELECTRIC GENERATION and TRANSMISSION COOPERATIVE, INC.; the ESTATE OF DUANE L. URQUHART; MARY URQUHART; SCOTT URQUHART; and LINDA URQUHART,

Intervenors and Appellees.

APPELLEE BOARD OF COUNTY COMMISSIONERS' SUPPLEMENTAL BRIEF ON THE ISSUE OF MOOTNESS

On Appeal from the Montana Eighth Judicial District Court
Cascade County, Montana
Cause No. BDV-08-480
Hon. E. Wayne Phillips

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I. STATEMENT OF THE ISSUE

Does the Cascade County Commissioners' adoption of new zoning regulations and a new zoning map following the Urquharts' rezoning decision challenged in this appeal render the Appellants' claims moot?

II. INTRODUCTION AND STATEMENT OF FACTS

Following oral arguments in this matter, the Court directed the parties to file supplemental briefs to address the issue of how Cascade County's new zoning regulations and zoning map affect the spot zoning claim asserted by Plains Grains.

First and foremost, the County stands by its arguments presented in its Reply Brief dated September 11, 2009. The County conducted a full and fair public process to consider the Urquharts' rezoning request and responded to the unique needs and challenges of a major utility facility by enacting appropriate conditions to bring the proposal into acceptable compliance with the County's Growth Policy and zoning regulations. However, because the County has adopted new County-wide zoning regulations and a new zoning map, the County determined it was necessary to alert the Court that the issues in the case are now moot based on the Court's clear precedent.

The County's new zoning regulations and map and the process followed to adopt them have not been challenged and are not the subject of this appeal. It is

the fact that such regulations have been adopted that triggers the mootness doctrine. Thus, the County provides the following relevant facts pertaining to the new zoning regulations to show that the mootness doctrine applies. The facts are supported by a series of exhibits. Exhibit A is the Staff Report prepared by the Cascade County Planning Department for the first public hearing held before the Cascade County Planning Board on April 21, 2009. Exhibit B is the minutes from the April 21, 2009, Cascade County Planning Board public hearing. Exhibit C is the minutes from a subsequent public hearing held by the Cascade County Planning Board on May 19, 2009 (pages reflecting unrelated matters have been removed). Exhibit D is the Cascade County's resolution of intent to adopt the new zoning regulations and minutes and documents from public hearings held before the County Commissioners on July 14, 2009, and July 22, 2009. Exhibit E is the final resolution adopting the new zoning regulations, approved on August 25, 2009, and signed August 28, 2009, along with related minutes and documents. Exhibit F is House Bill 486.

In the spring of 2008, Cascade County began a process to revise its County-wide zoning regulations and zoning map. The primary purpose of this effort was to update the regulations with current standard zoning practices, update and refine definitions, alter zoning districts and boundaries and to alter uses allowed in the

various zoning districts. Ex. A at 1. The County sent out approximately 1335 questionnaires to residents living in the unincorporated communities, targeting those areas where the agricultural zoning designation was most at odds with the existing land uses of those communities. Ex. A at 3. Based on the results of these questionnaires, comments, concerns and lessons learned by the Planning Staff since the adoption of County-wide zoning in 2005, Staff drafted revisions to the zoning regulations and maps and formed a working group to discuss them. Ex. A at 3, 7. The working group, which included the seven members of the Planning Board, conducted six review sessions prior to placing the draft revisions on the Planning Board's agenda. Ex. A at 3. At its monthly meeting on March 17, 2009, the Planning Board voted to schedule a public hearing on the proposed zoning revisions for Tuesday, April 21, 2009. On March 18, 2009, Planning Staff posted the draft documents and zoning map on the County's website, at the Clerk and Recorder's Office, the County Commissioners' Office and the County Planning Department for public review. Ex A at 3.

The County published notice of the Planning Board's public hearing in the *Great Falls Tribune* on five different days between March 22, 2009 and April 19, 2009. Ex. A at 8. At the public hearing on April 21, 2009, the Planning Board received a report from Planning Staff and heard public comments. Three members

of the public spoke in favor of the proposed zoning regulations. Approximately twenty-five members of the public spoke in opposition. Ex. B. On the basis of these comments, the Planning Board scheduled a follow up work session to continue to work on the proposed regulations. On May 19, 2009, the Board again took up the matter of the zoning revisions. Ex. C. Three members of the public spoke in favor of the zoning regulations and one e-mail was placed of record. Ex. C at 4. No one spoke in opposition to the revisions. Ex. C at 4. The Board voted unanimously to forward the revised zoning regulations to the Commissioners with the recommendation of approval. Ex. C at 4.

The Commissioners scheduled a public hearing to consider the new zoning regulations for July 14, 2009, and published notice of the hearing in the *Great Falls Tribune eight* times between May 24, 2009, and July 12, 2009. Ex. D at 10, 14. At the public hearing, three members of the public spoke in favor of the revisions to the zoning regulations, no one spoke in opposition and no written testimony had been received. Ex. D at 7. The Commissioners tabled final consideration of the new zoning regulations until July 22, 2009. Ex. D at 7. At the July 22, 2009 meeting, the Commissioners approved the new zoning regulations. Ex. D at 1. Consistent with Montana Code Annotated § 76-2-205, the Commissioners then published notice of their intent to adopt the new zoning

regulations and the corresponding thirty-day protest period in the *Great Falls Tribune* on three days between July 25, 2009, and August 8, 2009. Ex. E at 1, 8.

No one protested the adoption of the new zoning regulations and on August 25, 2009, the Commissioners passed a final resolution adopting the new zoning regulations and the new zoning map. Ex. E at 1-2. Changes to the zoning map include the reduction in the number of zoning districts from fifteen to twelve, a change in use from agricultural zoning to mixed-use zoning for the unincorporated communities, and a significant increase in the amount of land designated for light industrial and heavy industrial adjacent to and near the City of Great Falls. The new zoning regulations and zoning map became effective on August 25, 2009, with the Commissioners' approval of the final resolution. No one has filed an action challenging the adoption of the new zoning regulations or new zoning map. The land subject to this appeal remains zoned I-2, Heavy Industrial subject to the limitations and conditions imposed by the Commissioners during the Urquharts' rezoning request. "Electrical Generation Facilities" remain a permitted use in the A Agricultural district upon the issuance of a special use permit (the A1 and A2 districts were combined into a single A, Agricultural District).

Finally, effective May 5, 2009, the Montana Legislature made significant changes to the requirements for establishing zoning districts, including changes to

the "Lowe" criteria, the criteria which guide a local government's consideration of zoning and rezoning actions. Ex. F at 2-4 (Sections 6-8) (only relevant pages included); Mont. Code Ann. §§ 76-2-202, 203, 205 (2009). The new zoning regulations and new zoning map were adopted pursuant to the 2009 version of the relevant statutes and criteria, not the 2007 version in effect at the time of the Urquharts' rezoning request.

III. STANDARD OF REVIEW

Whether an appeal is moot is a threshold issue the Court must consider prior to deciding the matter on appeal. *Country Highlands Homeowners Assn., Inc. v. Bd. of County Commrs. of Flathead County*, 2008 MT 286, ¶ 16, 345 Mont. 379, 191 P.3d 424 (citing *Shamrock Motors, Inc. v. Ford Motor Co.,* 1999 MT 21, ¶ 19, 293 Mont. 188, 974 P.2d 1150). A "matter is moot when, due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy." *Country Highlands*, ¶ 16 (quoting *Shamrock Motors,* ¶ 19). "An appeal becomes moot when the Court cannot grant effective relief or the parties cannot be restored to their original position." *Country Highlands*, ¶ 16 (quoting *Shamrock Motors,* ¶ 19).

IV. ARGUMENT

As noted in the County's principle brief, amending zoning regulations is a

statutorily-prescribed process requiring a series of actions by the local county planning board and county commission, culminating in a legislative decision by the county commissioners. The Planning Board is responsible for preparing and revising zoning regulations and the procedures are specified in Montana Code Annotated § 76-2-205 (2009). Following these procedures, Cascade County conducted an eighteen-month public process to adopt new zoning regulations and a new zoning map. There were multiple opportunities for public participation and sixteen legal notices published in the *Great Falls Tribune*. Despite the multiple public participation opportunities and multiple notices, there is no evidence that any of the sixty plaintiffs in this action attended or participated in any of the public hearings. No one protested the adoption of the zoning regulations as provided in Montana Code Annotated § 76-2-205 (2009). Further, Plains Grains never sought a stay or injunction of the County's efforts related to the underlying action or the County's subsequent adoption of new zoning regulations and zoning map. Pursuant to the Court's clear precedent, the County's adoption of the new zoning regulations and zoning map and Plains Grains' failure to seek a stay of proceedings or injunction renders the issues in this case moot.

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A. The County's Adoption of New Zoning Regulations and a New Zoning Map Following the Urquhart's Rezoning Request Renders the Issues in This Case Moot.

This case presents the same situation addressed by this Court in *Country Highlands* in which the Court found the appeal moot due to a county's subsequent adoption of new regulations. *Country Highlands* involved a challenge to the Flathead County Commissioners' decisions to approve an amendment to the county's growth policy along with a rezoning of approximately 215 acres from agriculture to a mixture of residential and commercial zoning. *Country Highlands*, ¶ 8. Neighbors to the property sued, alleging procedural and substantive errors in the county's adoption of the growth policy amendment and zoning amendment. The District Court concluded the county's adoption of the growth policy amendment was procedurally and substantively correct and there was sufficient evidence to support the county's decision. *Country Highlands*, ¶ 12. The District Court also found the amendment to the zoning designation followed proper procedures and was not an abuse of discretion. *Country Highlands*, ¶ 12.

While the matter was on appeal, Flathead County adopted a new county-wide growth policy which replaced the growth policy in effect at the time of the growth policy amendment and rezoning decisions. *Country Highlands*, ¶ 13. The new growth policy specifically incorporated the existing zoning districts into a new land

use map that accompanied the growth policy. *Country Highlands*, ¶ 13. Flathead County did not change the zoning designation from the version challenged in the appeal to the one incorporated into the new growth policy. Flathead County argued that the original growth policy no longer had any effect and, therefore, the neighbors could not be restored to their earlier position and the matter was moot. *Country Highlands*, ¶ 20.

The Court agreed. Even if the Court chose to strike down the challenged growth policy amendment, the new zoning designation would remain valid by virtue of the Board's subsequent action of adopting it within the new growth policy. *Country Highlands*, ¶ 22. The new growth policy was presumed lawful and valid absent another challenge. *Country Highlands*, ¶ 22 (citing *Schanz v. City of Billings* (1979), 182 Mont 328, 335, 597 P.2d 67, 71). Thus, because the issues raised in the appeal were dependent upon a document which was no longer in effect, any decision by the Court in the appeal could not grant effective relief and could not return the neighbors to their original position. *Country Highlands*, ¶ 23. The appeal was dismissed on mootness grounds. *Country Highlands*, ¶ 23.

This case presents the same fact pattern which renders Plains Grains' appeal moot. Acting under the 2005 version of the County's zoning regulations and zoning map and pursuant to the 2007 version of Montana's zoning enabling act,

Title 76, Chapter 2, the Commissioners considered and ultimately approved the Urquharts' rezoning request. Subsequent to the rezoning decision and while this case has been on appeal, the County adopted new County-wide zoning regulations and a new zoning map. These documents are presumed lawful and valid and are not the subject of this appeal. *Country Highlands*, ¶ 22; *Schanz*, 597 P.2d at 71. They were enacted under the 2009 version of Montana's zoning enabling act. Like *Country Highlands*, the zoning designation for the property at issue did not change, but was incorporated within the new zoning regulations and zoning map which were approved by the County on August 25, 2009.

If the Court were to invalidate the approval of the Urquharts' rezoning request, the zoning designation for the property would remain valid by virtue of the zoning designated under the August 25, 2009 zoning regulations and map. Thus, the Court cannot grant effective relief and cannot restore Plains Grains back to its original position. The issues in this appeal are now moot.

B. The Exception to Mootness Does Not Apply Because Plains Grains Failed to Take Steps to Preserve the Status Quo.

As the Court noted in *Country Highlands* and during the oral arguments, there is an exception to the doctrine of mootness. *See Country Highlands*, ¶ 17 (citing *Montana-Dakota Utils. Co. v. City of Billings*, 2003 MT 332, ¶ 7, 318

Mont. 407, 80 P.3d 1247). Although the Court normally will not address moot questions, an exception exists for constitutional issues which are capable of repetition yet avoid review. *Montana-Dakota*, ¶ 7 (citing *Skinner Enters., Inc. v. Lewis & Clark City-County Health Dept.*, 1999 MT 106, ¶ 12, 294 Mont. 310, 980 P.2d 1049). A party invoking the exception must satisfy a two part burden: "(1) the challenged action must be too short in duration to be fully litigated prior to cessation; and (2) there must be a reasonable expectation that the same complaining party would be subject to the same action again." *Montana-Dakota*, ¶ 7 (citing *Skinner Enters.*, ¶ 18). "This exception recognizes that the amount of time inherent in the litigation process renders it nearly impossible in some cases for a final judicial decision to be reached before the case is rendered moot." *In re Pet. of Billings High Sch. Dist. No. 2 v. Billings Gazette*, 2006 MT 329, ¶ 14, 335 Mont. 94, 149 P.3d 565. Further, the exception "is properly confined to situations where the challenged conduct *invariably* ceases before courts can fully adjudicate the matter." *Billings High*, ¶ 15 (emphasis in original) (citation omitted). These factors are not present in this case.

In *Montana-Dakota*, the Court applied the exception to mootness in a case involving the extent to which a local government has the power to set franchise fees for public utilities. The utility companies claimed the City of Billings'

ordinance setting franchise fees amounted to an illegal tax on the sale of utility services. *Montana-Dakota*, ¶ 3. Although the City withdrew the ordinance (after being voted down by the citizens) prior to a decision on appeal, the Court proceeded to address the merits. It did so because franchise law was relatively undeveloped in Montana and the Court anticipated that the issue would arise again given "the inclination of Montana's local government leaders to exploit potential new sources of revenue." *Montana-Dakota*, ¶ 10.

In contrast to the facts presented in *Montana-Dakota*, the case law in Montana pertaining to spot-zoning claims is quite developed, though highly fact specific. The duration of a rezoning request is typically not so short as to escape litigation prior to its cessation as a rezoning runs with the land. This is apparent from reviewing the many rezoning opinions of this Court. All rezoning must follow the statutorily-prescribed process which includes public notice and an opportunity for public participation. They do not occur quickly, in secrecy, or as a matter of surprise. Further, given the unique nature of the Urquhart's request and the specific and unusual needs of the facility at issue, there is no reasonable expectation that Plains Grains would be subject to the same action again. There is certainly nothing involved in this case which lends itself to a governmental inclination to exploit. In any event, Plains Grains' strategy and consistent failure

to seek any kind of stay or injunction to preserve the status quo in this case precludes the use of the mootness doctrine in this case.

In *Billings High*, the *Billings Gazette* sought documents from a school district relating to disciplinary actions taken against two teachers. *Billings High*, ¶ 4. The district and the teachers argued the documents were protected from disclosure because the demands for individual privacy exceeded the merits of public disclosure. *Billings High*, ¶ 5. The District Court ultimately concluded that the need for public disclosure outweighed the rights to individual privacy and ordered the school district to produce the documents, which it did. *Billings High*, ¶ 9. On appeal the *Billings Gazette* argued the appeal was moot because the documents had been publicly disclosed, an action that could not be undone. Conversely, the teachers argued the exception to mootness should apply because future teachers might be subject to the same disclosure of personal information before the issue can be litigated.

The Court disagreed, finding the teachers' failure to seek a stay or injunction of the District Court's order to disclose the documents precluded the use of the exception:

> [W]e have stated that "[a] party may not claim an exception to the mootness doctrine where the case has become moot through that party's own failure to seek a stay of the judgment." *Turner v. Mountain Engineering and Const., Inc.,* 276 Mont. 55, 60,

> 915 P.2d 799, 803 (1996). We adopted this principle from *Gates v. Deukmejian,* 987 F.2d 1392 (9th Cir. 1993), wherein the Ninth Circuit Court of Appeals reaffirmed its prior cases holding that a party may not profit from the "capable of repetition yet evading review" exception to mootness, where through his own failure to seek and obtain a stay he has prevented an appellate court from reviewing the trial court's decision. The exception was designed to apply to situations where the type of injury involved inherently precludes judicial review, not to situations where the failure of parties to take actions has precluded review as a practical matter.
>
> *Gates,* 987 F.2d at 1408-09 (citation omitted). Thus, where a party has failed to obtain-or at least attempt to obtain-a stay of proceedings pending appellate review, that party may not take advantage of the "capable of repetition, yet evading review" exception to the mootness doctrine. *Gates,* 987 F.2d at 1409.

Billings High, ¶ 18. The teachers failed to request a stay of the District Court's order and made no attempt to preserve the status quo pending appellate review of their claims. *Billings High*, ¶ 20. Thus, because the teachers failed to utilize procedures to preserve their ability to appeal the relevant issues in the lawsuit, they could not avail themselves of the "capable of repetition, yet evading review" exception to the mootness doctrine. *Billings High*, ¶ 21.

As demonstrated throughout the briefing and the various orders in this case, Plains Grains has never sought a stay or injunction at any stage of the proceedings. Although the District Court order and this Court's order regarding supervisory control made dicta references to the potential that a sizeable injunction bond may

violate constitutionally guaranteed access to the Court, Plains Grains has never allowed that conversation to be a part of these proceedings. Bonds for potential damages while an injunction is pending during appeal are discretionary, but Plains Grains never asked the District Court or this Court to exercise such discretion. Mont. Code Ann. § 27-19-306 (2009); Mont. R. Civ. P. 62. Plains Grains did not seek an injunction to stop the construction of the Highwood facility. Plains Grains did not appeal the Cascade County Board of Adjustment's decision to affirm the Planning Director's issuance of a location conformance permit to allow construction to begin. Plains Grains did not participate, much less seek an injunction, in the County's process to enact new zoning regulations and a new zoning map.

Plains Grains may not profit from the "capable of repetition, yet evading review" exception to mootness, where through its own failure to seek and obtain a stay or injunction, Plains Grains has prevented this Court from reviewing the trial court's decision. The mootness "exception was designed to apply to situations where the type of injury involved inherently precludes judicial review, not to situations where the failure of parties to take actions has precluded review as a practical matter." *Billings High*, ¶ 18. Plains Grains has failed to utilize procedures to preserve the status quo and allow the Court to consider its claims.

The issues in this appeal are now moot and the exception to mootness does not apply.

V. CONCLUSION

Cascade County continues to assert it properly conducted the statutorily-prescribed process to consider the Urquharts' rezoning request and reached a decision that is clearly supported by the record. However, due to this Court's clear case law, the County recognized the importance of informing the Court of the mootness issues given the subsequent adoption of new zoning regulations and a new zoning map. This action renders the issues in this case moot. Further, the exception to the mootness doctrine does not apply because Plains Grains has intentionally failed to utilize available procedures to preserve the status quo pending appeal.

DATED this 17th day of December, 2009.

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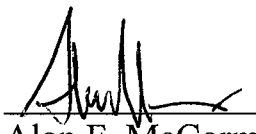
CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2007, is not more than 5,000 words, excluding Certificate of Service and Certificate of Compliance.

DATED this 17th day of December, 2009.



Alan F. McCormick

CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing *Appellee Board of County Commissioners' Supplemental Brief On The Issue of Mootness* by depositing said copies into the U.S. mail, postage prepaid, addressed to the following:

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APPELLEE BOARD OF COUNTY COMMISSIONERS' SUPPLEMENTAL BRIEF ON THE ISSUE OF MOOTNESS EXHIBITS

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